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No. 85-256

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

ST. JAMES HOSPITAL

and

HUMANA OF ILLINOIS, INC. d/b/a SPRINGFIELD COMMUNITY HOSPITAL
Respondents

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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* St. James Hospital, Inc. is a not-for-profit corporation. St. James Hospital, Inc. is a wholly-owned subsidiary of Sisters of St. Francis Health Services, Inc., a not-for-profit corporation.

Humana of Illinois, Inc. is a wholly-owned subsidiary of Humana Inc., a publicly-traded company. Humana of Aurora, Inc., which is also a subsidiary of Humana Inc., is the respondent in No. 85-53 which involves the same issues as this case.

TABLE OF AUTHORITIES

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42 U.S.C. § 1395oo(f)	*passim*
42 U.S.C. § 1395oo(f)(1)	*passim*
42 U.S.C. § 1395x(v)(1)(A)(ii)	*passim*

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JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents St. James Hospital and Humana of Illinois, Inc. hereby file this joint brief in opposition to the Secretary's Petition for Certiorari in the above-referenced case.

STATEMENT OF THE CASE

This certiorari petition filed by the Secretary of Health and Human Services asks the Court to review the third of seven appellate decisions all of which invalidated a regulation establishing a unique exception to the method employed by the Secretary for allocating costs necessarily incurred by hospitals

in furnishing services under the Medicare Act, 42 U.S.C. § 1395 *et seq.* Under the 1979 regulation, known as the "Malpractice Rule," a hospital's insurance premiums are no longer apportioned to Medicare patients on the basis of their relative utilization of the hospital, which is the method used to allocate all other costs. Instead, premiums are apportioned on the basis of the paid claims experience of Medicare patients at the facility relative to the aggregate claims experience of all patients at the facility. Seven courts of appeals and twenty-six district courts variously have concluded that the apportionment of malpractice insurance premiums under the Malpractice Rule violates the Administrative Procedure Act and the Medicare Act.

Here, the Secretary has petitioned the Court to issue a writ of certiorari to the Seventh Circuit to review its decision in *St. James Hospital v. Heckler* and *Humana of Illinois, Inc. v. Heckler,* 760 F.2d 1460 (7th Cir. 1985). In support of this petition, the Secretary has incorporated the grounds set forth in the two petitions she filed earlier seeking a writ to the Third Circuit in *Heckler v. Abington Memorial Hospital,* No. 85-52 (filed July 11, 1985), and to the Tenth Circuit in *Heckler v. Humana of Aurora, Inc.,* No. 85-53 (filed July 11, 1985). Events since the respondents in those two cases filed their memoranda in opposition to certiorari warrant brief comments by the Seventh Circuit hospitals. With that exception, however, the Seventh Circuit hospitals incorporate the analysis of the respondents in *Abington* and *Aurora* in opposing the Secretary's petition for a writ of certiorari.

Background of Proceedings

In 1980, respondents each submitted claims to the Secretary, seeking Medicare reimbursement for malpractice premiums apportioned under the utilization formula. Because Springfield had paid only $750 in malpractice losses during the preceding five years, all to non-Medicare patients, Springfield was denied any reimbursement for its Malpractice insurance premium, even though Springfield's Medicare utilization rate was over 49 percent. As a result, Springfield was denied $37,000 in reimbursement to which it was entitled. Similarly, because approximately 20 percent of St. James' losses were

paid to Medicare patients the intermediary paid only one-fifth of St. James' premium, even though its Medicare utilization rate was over 30 percent. As a result, St. James was denied $24,159 in reimbursement to which it was entitled.

After each hospital filed a timely appeal with the Provider Reimbursement Review Board ("Board") to contest the denial of its reimbursement claims, the Board determined that it lacked authority to adjudicate the claims, and certified that the claims were subject to the expedited judicial review procedures of 42 U.S.C. § 1395oo(f)(1). The hospitals then each appealed the intermediary's action to the federal district court. *See* 42 U.S.C. § 1395oo(f). The respective district courts granted each hospital's motion for summary judgment. *Humana of Illinois, Inc. d/b/a Springfield Community Hospital v. Heckler*, 584 F.Supp. 618 (C.D. Ill. 1984); *St. James Hospital v. Heckler*, 579 F.Supp. 757 (N.D. Ill. 1984). On appeal, the Court of Appeals for the Seventh Circuit, in a consolidated opinion, affirmed the opinions and orders of the trial courts, holding that the Malpractice Rule violated the Administrative Procedure Act and the Medicare Act. *St. James Hospital v. Heckler*, 760 F.2d 1460 (7th Cir. 1985).[1]

REASONS THE WRIT SHOULD BE DENIED

I. SUMMARY OF ARGUMENT

1. Respondents St. James Hospital and Humana of Illinois, Inc. oppose the Secretary's petition for certiorari on the grounds that there is no conflict among the circuits. In general, these reasons have been discussed adequately in the respondents' Briefs in Opposition to Petition for Certiorari in *Heckler v. Abington Memorial Hospital*, No. 85-52, and *Heckler v.*

[1] In light of this decision, the Court of Appeals for the Seventh Circuit remanded the case for clarification of the court's resolution of two other claims raised by Humana. *See* Brief of Petitioner at 24a. If the Court should vacate the Seventh Circuit's decision regarding the Malpractice Rule, Humana respectfully requests the Court to remand the case to the lower court for further consideration of Humana's alternative claims.

Humana of Aurora, Inc., No. 85-53, which respondents here incorporate by reference.

2. In her reply to the respondents' briefs in Nos. 85-52 and 85-53, the Secretary has presented an additional reason she believes a conflict exists among the circuits, relying on the reconsideration decision of the United States Court of Appeals for the Fifth Circuit in *DeSoto General Hospital v. Heckler*, 766 F.2d 182 (5th Cir. 1985), *on reconsideration*, No. 84-3577 (August 19, 1985). There, the Fifth Circuit revised its initial decision—which had directed the Secretary to make payment to the hospitals under the utilization reimbursement formula—to specify that the hospitals' claims should be evaluated under a new reimbursement regulation that the Secretary proposed in June 1985. The Secretary contends that the Fifth Circuit's revised judgment conflicts with the decisions of the Third, Seventh and Tenth Circuits.

3. In truth, the different remedies entered by the courts merely reflect the different grounds each adopted for invalidating the Rule. The Fifth Circuit decided that the 1979 Rule violated the Administrative Procedure Act, and therefore specified that the Secretary should have the opportunity to correct the numerous deficiencies in the Rule. The Seventh Circuit, on the other hand, found that any departure from the reimbursement formula in effect prior to 1979 violated the Medicare Act, and therefore that the Secretary could not through additional rulemaking proceedings correct the numerous deficiencies in the Rule. Thus, while the different remedies adopted by the circuits may reflect a difference of opinion as to why the Secretary has acted illegally, that dispute hardly is worthy of this Court's consideration.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

The Secretary suggests that a writ should issue to the Seventh Circuit here for the reasons offered in her petitions in *Heckler v. Abington Memorial Hospital*, No. 85-52 (*petition for cert. filed* July 11, 1985), and *Heckler v. Humana of Aurora*,

Inc., No. 85-53 (*petition for cert. filed* July 11, 1985), seeking review of the decisions of the Third and Tenth Circuits. In those petitions the Secretary contended, *inter alia*, that review of the decisions was warranted because the lower courts had erred in ordering the Secretary to compensate the hospitals for the disputed malpractice insurance premiums. Instead, according to the Secretary, upon finding that the Malpractice Rule was illegal, the courts should have remanded the matter to the Secretary for further rulemaking proceedings. *See generally* Petition for Writ of Certiorari, *Heckler v. Abington Memorial Hospital*, No. 85-52, at 15-17.

Since those petitions were presented to the Court—and after the *Abington* and *Aurora* hospitals had filed their responses—the Secretary advised the Court of the action of the Fifth Circuit on rehearing in *DeSoto General Hospital v. Heckler*, 766 F.2d 182 (5th Cir., July 5, 1985), *petition for rehearing granted*, No. 84-3577 (August 19, 1985). On rehearing the Fifth Circuit vacated that portion of its opinion directing the Secretary to reimburse the *DeSoto* hospitals under a utilization formula. Instead, the Fifth Circuit remanded the case to the agency for reconsideration of the hospitals' claims under a proposed "new" rule affecting malpractice insurance premium reimbursement. *See* App., *infra*, 2a, *citing* 50 Fed. Reg. 25178 (June 17, 1985).[2]

The Secretary contends that the Fifth Circuit's action finally creates a conflict among the circuits, inasmuch as the other circuits have ordered the Secretary to reimburse their hospitals under the utilization-apportionment formula. On closer analysis, however, these events simply underscore the reasons that the Third, Seventh, and Tenth Circuits' decisions need not be reviewed.

If the basis for each of the decisions is considered, it is readily apparent that the Secretary's assertion that a "conflict" exists is weak. In *DeSoto*, the Fifth Circuit was limited to evaluating the Malpractice Rule under the Administrative Procedure Act, because the district court in *DeSoto* had ex-

[2] On September 13, 1985 the *DeSoto* hospitals asked the Fifth Circuit to reconsider its August 19, 1985 order.

plicitly declined to evaluate the Rule under the Medicare Act. *DeSoto General Hospital v. Heckler*, 766 F.2d 182, 184 (5th Cir. 1985). Given the limited scope of issues presented to it for resolution, the Fifth Circuit did not have the opportunity to evaluate whether payments under a method other than the utilization formula were consistent with the Medicare Act.

In sharp contrast, the Seventh Circuit here invalidated the Malpractice Rule not only on account of the procedural defects it suffered, but also because payment to hospitals calculated under the Rule violated the Medicare Act. In particular, the Seventh Circuit concluded that "The carrying of malpractice insurance must be deemed a reasonable cost, and thus reimbursable by Medicare. . . ." *St. James Hospital v. Heckler*, 760 F.2d 1460 (7th Cir. 1985), *reproduced in* Appendix A at 22a, Petition for Writ of Certiorari, *Heckler v. St. James Hospital*, No. 85-256 (filed August 16, 1985). In light of this conclusion, the Seventh Circuit's directive ordering payment under the utilization formula is appropriate.[3]

In sum, the history of the litigation challenging the Malpractice Rule is reduced to the hardly novel proposition that the relief entered by the lower courts is a function of the reasons they offered for invalidating the Secretary's actions. The Fifth Circuit, concluding that the Secretary's promulgation of the Rule violated the Administrative Procedure Act, extended the Secretary a second chance to exercise her rulemaking authority. The Seventh Circuit, concluding that the calculation of reimbursement under any formula other than utilization apportionment violated the Medicare Act, ordered the Secretary to make payment. These distinct approaches, however, do not create a conflict among the circuits worthy of this

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[3] This analysis is consistent with the Third Circuit's decision in *Abington* in which it also concluded that calculation of payments to the *Abington* hospitals violated the Medicare Act. *See Abington Memorial Hospital v. Heckler*, 750 F.2d 242 (3rd Cir. 1984), *reproduced at* Appendix A at 9a-10a, Petition for Writ of Certiorati, *Heckler v. Abington Memorial Hospital*, No. 85-52 (filed July 11, 1985). While the Tenth Circuit in *Aurora* only ruled on the Administrative Procedure Act issues, on remand to the district court the Secretary did not oppose Aurora's Motion for Entry of Judgment. *See* Brief in Opposition to Petition for Writ of Certiorari, *Heckler v. Humana of Aurora, Inc.*, No. 85-53, at 12-13.

Court's consideration: Any conflict that exists is merely a dispute in the basis for the conclusion that the Secretary has acted illegally.[4]

CONCLUSION

For the foregoing reasons, and those offered by respondents in Nos. 85-52 and 85-53, the Court should deny the Secretary's petition for writ of certiorari.

Respectfully submitted,

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[4] Finally, the Secretary seeks to justify review by arguing that she has the inherent power to issue retroactive rules by virtue of her authority to make "suitable retroactive corrective adjustments" under 42 U.S.C. § 1395x(v)(1)(A)(ii). Reply Brief for Petitioners, *Heckler v. Abington Mem. Hosp.*, No. 85-52 at 1. While respondents do not agree with the Secretary's contention, her assertion of this authority highlights why her petition for certiorari should be denied. If the promulgation of the 1985 Rule falls within this provision, the Secretary can make whatever adjustments are appropriate and this Court's intervention is unnecessary. If, on the other hand, the promulgation of the 1985 Rule does not fall within the provisions of § 1395x(v)(1)(A)(ii), then Congress apparently did not want the Secretary to exercise this power in these circumstances.

APPENDIX

DESOTO GENERAL HOSPITAL, *et al.*,
Plaintiffs-Appellees,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants

No. 84-3577

United States Court of Appeals, Fifth Circuit.

Aug. 19, 1985

Appeal from the United States District Court for the Middle District of Louisiana, Frank J. Polozola, Judge.

ON PETITION FOR REHEARING

(Opinion of July 5, 1985, 5th Cir. 1985, 766 F.2d 182).

Before GARZA, POLITZ and DAVIS, Circuit Judges.

PER CURIAM:

The Secretary of Health and Human Services petitions for rehearing, asking that resolution of this appeal be held in abeyance pending disposition of pending petitions for certiorari in *Abington Memorial Hospital v. Heckler,* 750 F.2d 242 (3d Cir. 1984), and *Humana of Aurora, Inc. v. Heckler,* 753 F.2d 1579 (10th Cir. 1985). We decline to do so.

The Secretary alternatively requests that we vacate that portion of our opinion modifying the judgment of the district court and directing the reimbursement of the appellee-hospitals "pursuant to 42 C.F.R. § 405.452(b)(1) (1979), without reference to the abrogated malpractice rule." The Secretary urges a remand to the Provider Reimbursement Review Board for appropriate action, specifically, reconsideration under a proposed new rule affecting malpractice insurance premium

reimbursement. *See* 50 Fed. Reg. 25178 (June 17, 1985). This alternative suggestion is meritorious.

The petition for rehearing is granted in part and appellees' claims are remanded to the PRRB for reconsideration in light of relevant changes occurring after the Board's initial rulings herein. In all other respects the petition for rehearing is denied and our original opinion is reconfirmed.